Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-765

In The

Supreme Court of the United States

October Term, 1988

THANH VONG HOAI,

Petitioner,

v.

THANH VAN VO; THACH DUY NGUYEN; MY-LINH D. SOLAND; NGUYEN THI BACH LUU; THANH VAN VO, d/b/a SUNTECH SUNOCO, INC.; AND MICHAEL ARIF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT MY-LINH D. SOLAND'S BRIEF IN OPPOSITION

W. Michael Holm
Hazel, Thomas, Fiske,
Beckhorn & Hanes, P.C.
510 King Street, Suite 200
Alexandria, Virginia 22314
(703) 838-5144
Counsel of Record for
Respondent My-Linh D. Soland

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether the original Complaint in this action, comprising some 133 pages, 367 paragraphs and 24 counts, was properly dismissed for violating Rule 8 of the Federal Rules of Civil Procedure.

II. Whether Count One of the Amended Complaint, alleging a violation of the Racketeer Influenced and Corrupt Organizations Act, was properly dismissed for failing to adequately allege a "pattern" of racketeering activity or an "enterprise" within the requirements of the Act.

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STATEMENT OF THE CASE

On March 25, 1987, petitioner Thanh Vong Hoai ("Hoai") filed a 133 page Complaint containing 24 counts against respondents My-Linh D. Soland ("Soland"), Thanh Van Vo ("Vo"), Thach Duy Nguyen ("Thach"), Nguyen Van Minh ("Minh"), Nguyen Thi Bach Luu ("Luu"), Michael S. Arif ("Arif"), Suntech Sunoco, Inc. ("Suntech") and others whose names are unknown. (See Appendix III, Parts C-F). The Complaint was supported by a 285 page Affidavit containing some 804 separate paragraphs. (See Appendix II, Parts A-F and Appendix III, Parts A-B).

On May 8, 1987, upon motion of respondent Soland, the district court dismissed the Complaint as being violative of Rule 8 of the Federal Rules of Civil Procedure.

On May 22, 1987, Hoai filed a 38 page, ten count Amended Complaint containing 149 paragraphs. (See Appendix III, Part G). Count I, at issue before this Court, alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*

Soland and the other respondents again moved to dismiss. The district judge granted the motions and dismissed the Amended Complaint. In dismissing the RICO count with prejudice the judge held that Hoai had not properly alleged the existence of an "enterprise" or a "pattern" of activity which could evidence a RICO violation.

The allegations in the Amended Complaint are complex, rambling, disjointed, and in many cases unintelligible. Significantly, however, those allegations which relate to respondent Soland are relatively few.

Mrs. Soland is an attorney who represented petitioner Hoai for approximately two months during the summer of 1986. According to the Amended Complaint, at the same time or during a portion of the time, she also represented two of the other respondents, Minh and Luu. Hoai alleges that this duality of representation created a conflict of interest; that during this period Soland wrote several letters on behalf of and to Hoai; and that her withdrawal as counsel for Hoai was improper. At best these are allegations of legal malpractice against Soland.

Hoai, however, alleges that Soland was part of a corrupt conspiracy consisting of the other respondents as well as a gang of unknowns called the "cowboys," which conspiracy violated the RICO Act, securities laws and numerous other concepts of common law torts. Yet, notably absent even from Hoai's petition for certiorari are substantial allegations against Soland. In fact the only references to allegations against her appear at pages 15 and 19.[1]

When these allegations are evaluated in light of the pleading requirements for a RICO violation, Soland submits that no cause of action for violation of the RICO Act was stated against her, and the district judge's decision dismissing the case was proper.

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[1] The allegation of forgery against Soland that appears in a footnote on page 19 of Hoai's petition is neither made in the original, nor Amended Complaints. Therefore, the reference to it in Hoai's petition is wholly improper.

SUMMARY OF ARGUMENT

Hoai's original Complaint in this action containing 133 pages, 367 paragraphs, and 24 counts of rambling allegations was so verbose that neither counsel nor the district court could identify the claims made. It violated the requirements of Rule 8 of the Federal Rules of Civil Procedure that a complaint contain "a short and plain statement" of the claim. Accordingly, it was properly dismissed.

Count One of the Amended Complaint alleged a violation of the RICO Act. To state a cause of action under that Act, certain, "predicate acts" must be alleged which demonstrate a "pattern" of racketeering activity that takes place through an "enterprise." Hoai's Amended Complaint failed to meet any of these requirements.

An "enterprise" must be a continuing unit that functions separate and apart from the racketeering activity in which it engages. Hoai merely alleges loose, undefined associated-in-fact enterprises wherein the respondents are also the enterprises. Those allegations do not satisfy the "enterprise" requirements of the Act.

Similarly, a "pattern" requires that the predicate acts alleged be related and part of a continuous criminal endeavor. They cannot be part of a single fraudulent scheme that has only one victim. Here Hoai only alleges one limited fraudulent scheme with one victim. Such allegations do not rise to a level necessary to satisfy the "pattern" requirement of the Act.

Nor does Hoai set forth any "predicate acts" by Soland which could form the basis of a "pattern" of racketeering activity violative of the RICO Act. Accordingly, Count One was properly dismissed by the district judge.

ARGUMENT

I. The District Judge Properly Dismissed Petitioner's Original Complaint for Violating Rule 8 of the Federal Rules of Civil Procedure.

Hoai filed an initial Complaint in this action that comprised 133 pages containing 367 paragraphs of allegations and 24 separate counts. It was supported by a 285 page Affidavit containing 804 separate paragraphs. On respondents' motion it was properly dismissed.

In his petition for certiorari, Hoai relies heavily on those allegations in the original Complaint and Affidavit. Yet he does not challenge the propriety of that Complaint's dismissal. Rather, he challenges the district court's dismissal of his Amended Complaint for the failure to allege an "enterprise" or "pattern" of racketeering activity. Accordingly, this Court's analysis must be confined to determining whether the allegations in the Amended Complaint meet the pleading requirements.

By continuing to analyze the issues with reference to the original Complaint and Affidavit, Hoai attempts to mislead this Court. That Complaint was not dismissed for failure to properly allege an "enterprise" or "pattern" within the RICO requirements. The only issue considered by the court was whether that Complaint violated Rule 8

of the Federal Rules of Civil Procedure ("F.R.C.P."). It is therefore improper to attempt to buttress his argument that a "pattern" and "enterprise" were properly alleged by reference to that Complaint and Affidavit. And to argue that he could not properly plead a RICO violation in the "sparse, sterile" 38 page Amended Complaint containing 149 paragraphs defies credulity. Nevertheless, it is important that this Court recognize that the original dismissal was proper.

Rule 8(a) F.R.C.P. provides that a pleading setting forth a claim for relief shall contain:

> (1) A *short and plain statement* of the grounds upon which the court's jurisdiction depends . . . (2) *a short and plain statement* of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled . . . (Emphasis added).

Subparagraph (e) of this Rule provides that:

> (1) Each averment of a pleading shall be *simple, concise, and direct* . . . (Emphasis added).

Hoai's initial Complaint directly violated these Rules.

The objective of Rule 8 is to make complaints simpler, rather than more expansive, *Harrell v. Directors of Bur. of Narcotics*, 70 F.R.D. 444, 445 (E.D. Tenn. 1975) (citing numerous cases in support), thus, avoiding situations where a pleading is so verbose that the court cannot identify with clarity the claims made and adjudicate such claims understandingly on the merits. *Id.* at 446.

The majority rule, and that adopted by the Fourth Circuit, requires dismissal of complaints which violate Rule 8. The District Court of Maryland in *Holsev v. Collins*, 90 F.R.D. 122 (D. Md. 1981) noted:

> The instant Complaint . . . [which] places an unjustifiable burden on defendants to determine the nature of the claim against them and to speculate on what their defenses might be, and which imposes a similar burden on the court to sort out the facts now hidden in a mass of charges, arguments, generalizations and rumors, violates the Rule [F. R. Civ. P. 8] . . . , and is subject to dismissal.

Id. at 124, *citing DeFina v. Latimer*, 79 F.R.D. 5, 7 (E.D. N.Y. 1977). See also *Choate v. United States*, 413 F. Supp. 475 (N.D. Ok. 1976).

The *Holsev* court cited an unpublished Fourth Circuit case, *Arev v. Harris*, No. 74-2360 (4th Cir. June 17, 1975) which set forth the rule in that circuit:

> The requirements of a short and plain statement of a claim and simple, concise, and direct averments have been held to be violated by needlessly long, repetitious, or confused complaints.

Id. at 126, citing 5 Wright & Miller, *Federal Practice and Procedure*, Civil, Section 1217 (1969) and other cases. In *Arev*, the Fourth Circuit upheld dismissal of a 125 page complaint.

Hoai's Complaint, a rambling, disjointed, sometimes unintelligible narrative comprising 133 pages, failed to comply with any of the requirements of Rule 8.

> Complaints which ramble, which needlessly speculate, accuse, and condemn, and which contain circuitous diatribes far removed from the heart of the claim do not comport with these goals and this system; such complaints must be dismissed.

Prezzi v. Berzak, 57 F.R.D. 149, 151 (S.D. N.Y. 1972). *See also Brown v. Califano*, 75 F.R.D. 497 (D. D.C. 1977). Accordingly, the district court acted appropriately and within its

discretion in dismissing the original Complaint for violating Rule 8, F.R.C.P.

II. Count One of the Amended Complaint Alleging Violations of the RICO Act Failed to State A Cause of Action, Its Dismissal Was Proper, and Petitioner Has Demonstrated No Compelling Reasons for This Court to Grant Certiorari.

Count I of the Amended Complaint alleges a violation of the RICO Act. Hoai alleges that the respondents violated subparagraphs (a), (b), (c), and (d) of 18 U.S.C. § 1962. (See attachment to Petition for Certiorari). An analysis of the Amended Complaint's allegations in light of the legal requirements to sustain a cause of action for a RICO violation demonstrates that the Amended Complaint is plainly insufficient and was properly dismissed.

To overcome a motion to dismiss, a complaint alleging a RICO violation must be pled with the particularity required in cases alleging fraud. *Estate of Dearing by Dearing v. Dearing*, 646 F. Supp. 903, 914 (S.D. W.Va. 1986); *Taylor v. Bear Stearns and Company*, 572 F. Supp. 667 (N.D. Ga. 1983). A fair reading of this Amended Complaint demonstrates beyond cavil that the allegations have not been so pled. The Amended Complaint simply generalizes and contains conclusory allegations of wrongdoing without any facts that support those allegations.

As a threshold matter, the RICO Act requires that certain "predicate acts" be alleged which demonstrate a "pattern" of racketeering activity that takes place through an "enterprise." An examination of Hoai's allegations demonstrates that he has failed to plead either a

"pattern," "enterprise," or the necessary "predicate acts" to sustain a cause of action for a RICO violation.

A. Enterprise

The requirements to establish an "enterprise" in the Fourth Circuit are clear. In *United States v. Griffin*, 660 F.2d 996 (4th Cir. 1981), that court stated that:

> Proof of the existence of an associated-in-fact enterprise requires proof of a "common purpose" animating its associates, and this may be done by evidence of an "on-going organization, formal or informal," of those associates in which they function as a "continuing unit."

660 F.2d at 1000, quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981). Additionally, the *Griffin* Court emphasized that the association must exist separate and apart from the racketeering activity in which it engages. *Griffin*, 660 F.2d at 999; *See also United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985). That is:

> The ties between the individual associates that are implied by these concepts of continuity, unity, shared purpose, and identifiable structure operate precisely to guard against the danger that guilt will be adjudged solely by virtue of associations not so related. They define the line between "concerted action" through "group association for criminal purpose," for which "combination in crime" may constitutionally be proscribed . . . and less clearly related conduct that may not be so proscribed and prosecuted.

Griffin, 660 F.2d at 1000. *See United States v. Bledsoe*, 674 F.2d 647, 664-65 (8th Cir. 1982).

In *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982), the Eighth Circuit summarized the three basic characteristics of an "enterprise": (1) a common or shared purpose which animates those associated with it; (2) that there be continuity of both structure and personality, that is, that the enterprise function as a continuing unit; and (3) that the enterprise have an "ascertainable structure" distinct from that inherent in the conduct of a pattern of racketeering activity. *Id.* at 665. "The enterprise must be more than an informal group created to perpetrate the acts of racketeering." *Id.* at 663.

The only substantive allegation in the Amended Complaint regarding "enterprises" appears at paragraph 116. (See Appendix III, Part G at pages 450-51). And those "enterprises" listed are merely loose, undefined associations of the various individual defendants. Wholly absent are any allegations that would satisfy the requirements set out in *Bledsoe* or *Griffin*. The associations are not specifically identified, there are no suggestions that they have a continuing operation, that they exist for any purpose other than the racketeering acts allegedly committed by defendants, or that they have any structure or continuity or any particular purpose that unites them.

Moreover, in *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982) the Fourth Circuit adopted the majority rule and held that a defendant could not also be the "enterprise" in question. In that case the court noted:

> There is, however, the remaining problem . . . of whether Congress ever intended in 18 U.S.C. § 1962, that the statute prohibit activities by a person where the activities are described as occurring with any

> enterprise when there was identity between the person, on the one hand, and the enterprise, on the other. We conclude that "enterprise" was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and failing that, to punish.

689 F.2d at 1190. *See also Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279 (4th Cir. 1987); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir. 1987); *Schofield v. First Commodity Corporation of Boston*, 793 F.2d 28 (1st Cir. 1986); *Bishop v. The Corbitt Marine Ways, Inc.*, 802 F.2d 122 (5th Cir. 1986); *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984); *B.F. Hirsch v. Enright Refining Company, Inc.*, 751 F.2d 628 (3d Cir. 1984).

Yet that is precisely what Hoai has alleged in his Amended Complaint, numerous loose associations of the various individual respondents wherein there is identity between the respondents and the alleged enterprises. Accordingly, the allegations of "enterprise" are plainly insufficient.

The only allegation of "enterprise" in paragraph 116 of the Amended Complaint against Soland appears at subparagraph (d): "the enterprise consisting of all the defendants who were associated-in-fact." Clearly that allegation is insufficient to tie Soland to any legitimate "enterprise." None of the required factors set out in *Bledsoe* or *Griffin* have been alleged against her.

In the absence of detailed allegations as to the "enterprise," the RICO count is defective and properly was dismissed. *Tyco Trucking Company, Inc. v. Belk Store Services, Inc.*, 608 F. Supp. 812, 817 (W.D. N.C. 1985). See

also *In Re Action Industries Tender Offer*, 572 F. Supp. 846, 849 (E.D. Va. 1983).

Petitioner has not demonstrated any conflicts among the circuits as to the "enterprise" requirement, nor can he. This defect in the Amended Complaint alone is sufficient reason for this Court to deny the Petition for Certiorari.

B. Pattern

Additionally, to state a cause of action for a RICO violation it is required that there be a "pattern" of racketeering activity. The current interpretation of "pattern" is based upon this Court's treatment of the term in *Sedima v. Imrex Company, Inc.*, 473 U.S. 479 (1985). In *Sedima* this Court noted:

> As many commentators have pointed out the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance, two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate report explained: "The target of RICO is thus not sporadic activity." The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

473 U.S. at 496, n. 14.

Not only has Hoai failed to set forth the "enterprise" involved sufficiently, he has failed to allege a "pattern" of racketeering activity. As this Court stated, the concept of pattern requires more than two racketeering activities. That is, it must be alleged that the defendants participated in racketeering activity in more than the single instance applied to the case at bar. Where the conduct is part of the same fraudulent scheme, the "continuity" required by the statute is lacking. *See Northern Trust Bank/ O'Hare, N.A. v. Inryco. Inc.*, 615 F. Supp. 828 (N.D. Ill. 1985).

In *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987), the Fourth Circuit articulated its pleading requirements for a "pattern" of racketeering activity in light of *Sedima*. It noted that the "continuity plus relationship" requirement articulated by this Court in *Sedima* requires that the predicate acts be related and be part of a continuous *criminal* endeavor. The court was quick to state that a single, limited fraudulent scheme was not sufficient to satisfy the "pattern" requirement.

> If the commission of two or more "acts" to perpetrate a single fraud were held to satisfy the RICO statute, then every fraud would constitute "a pattern of racketeering activity." It will be the unusual fraud that does not enlist the mails and wires in its service at least twice. Such an interpretation would thus eliminate the pattern requirement altogether.

Id. at 154-155. *See also, One-O-One Enterprises, Inc. v. Caruso*, 668 F. Supp. 693 (D. D.C. 1987), *aff'd*, 848 F.2d 1283 (D.C. Cir. 1988); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th Cir. 1987); *Torwest v. Dick*, 810 F.2d 925 (10th Cir. 1987); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

The district judge, in dismissing this case, held that Hoai had alleged one single limited scheme to defraud one victim. That ruling was wholly correct. Even viewing the allegations in a light most favorable to Hoai's position, there is but one fraud allegedly perpetrated by these respondents against one individual, Hoai. That the fraud involved the loan of money for the purchase of two businesses, the Sunoco station and the grocery, is not significant. Clearly from the allegations in the Amended Complaint, all of the acts alleged regarding both businesses are interrelated. The Fourth Circuit in *Zepkin* noted that the number of predicate acts is not an appropriate litmus test in determining the existence of a RICO pattern.

> The perpetration of numerous acts of mail and wire fraud "may be no indication of the requisite continuity of the underlying fraudulent scheme."

Id. at 155, citing *Lipin Enterprises v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986).[2]

Rather, the analysis must focus upon the ultimate objective of the scheme of related predicate acts. Where the scheme has a single, limited objective as alleged here – the economic demise of petitioner Hoai – the "pattern" requirement is not satisfied. Such an objective does not evidence "ongoing criminal activity of sufficient scope and persistence to pose a special threat to social well-

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[2] For example, multiple mailings in furtherance of a single criminal episode are insufficient to allege a pattern of racketeering under § 1961. *Medical Emergency Service Associates v. Foulke*, 633 F. Supp. 156 (N.D. Ill. 1986), *aff'd*, 844 F.2d 391 (7th Cir. 1988).

being." *Walk v. Baltimore and Ohio Railroad*, 847 F.2d 1100, 1104 (4th Cir. 1988). And it is criminal activity to which the RICO statute was designed to apply.

> The pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes.

Zepkin, 812 F.2d at 155, citing *Lipin Enterprises*, 803 F.2d at 324.

The allegations in the Amended Complaint as they relate to Soland do not evidence any criminal wrongdoing. As the Fourth Circuit in *Zepkin* concluded:

> What constitutes a RICO pattern is thus a matter of criminal dimension and degree. To allow a "pattern of racketeering" to flow from a single, limited scheme such as this one would undermine Congress' intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.

Id. at 155.

To the extent that Hoai alleges any "pattern" of activity by Soland, that lone allegation involves undefined "various schemes to defraud various clients by defendant Soland." (Amended Complaint, Paragraph 113(i), See Appendix III, Part G, page 449). To meet the pleading requirement as to a "pattern" of racketeering activity by Soland, the factual elements of the activity must be alleged with specificity. *Dearing*, 646 F. Supp. at 914. Hoai has not done so, nor can he. Rather, in an effort to create a grand conspiracy, Hoai has linked Soland into the scheme through the use of broad generalized allegations. They are plainly insufficient to meet the requirements

that the scheme pose a special threat to social well-being and the dismissal below was proper.

In his petition Hoai relies upon several cases from the Eleventh Circuit which hold that the required predicate acts can occur as part of a single scheme with a single victim and yet satisfy the "pattern" requirements. See *United States v. Hobson*, 825 F.2d 364, 366 (11th Cir. 1987) and *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).[3] Such a view is an aberration, is not in consonance with this Court's holding in *Sedima*, and should not serve as a basis for granting certiorari in this case.

In footnote 14 of the *Sedima* opinion, this Court noted that the "pattern" requirement was designed to exclude isolated acts of racketeering activity from the Act's coverage. Rather, the Act required a "continuity" of activity. To adopt the Eleventh Circuit's rule would effectively overrule the *Sedima* holding by reading the "continuity" requirement out of the statute.

Under the Eleventh Circuit's view, two acts of mail fraud which occur in the same limited scheme satisfy the "pattern" requirement without regard to whether the

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[3] Hoai also cites *4447 Corporation v. Goldsmith*, 504 N.E. 2d 559 (Ind. 1987) and *State v. Sappenfield*, 505 N.E. 2d 504 (Ind. 1987) two cases currently pending before this Court as evidence of a split in the circuits as to the "pattern" requirement. Both deal, however, with an Indiana Statute and specifically whether obscenity violations can constitute predicate acts under that state's RICO statute. These cases have absolutely no bearing on issues before this Court in the case at bar.

defendants have engaged in any other racketeering activities with different victims. That view would effectively permit any garden variety fraud case to satisfy the requirements for a RICO violation. Yet Congress' expressed intent in drafting the RICO Act was to provide a weapon to be used against *ongoing* unlawful activities. *Zepkin*, 812 F.2d at 155. This Court recognized that intent in *Sedima* in articulating the "continuity" requirement. The Eleventh Circuit's rule clearly violates congressional intent as well as the pronouncements of this Court on the issue.

While petitioner has indeed identified a split in the circuits on this issue, this Court should not grant his petition in this case. Throughout this brief in opposition, counsel has demonstrated the numerous deficiencies in Hoai's Complaint and Amended Complaint, deficiencies which if evaluated alone demonstrate the correctness of the district court's actions. Taken individually they provide sufficient reason to deny Hoai's petition. The "pattern" argument is not critical to sustaining the lower court's actions. A resolution of the proper interpretation of the "pattern" requirement would be better left to another case.

C. Predicate Acts

The "pattern" element of the RICO Statute requires the commission of more than one "predicate act" of racketeering activity. The types of activities which satisfy this requirement under the RICO Act are those illegal activities for which an individual may be prosecuted. (See 18 U.S.C. § 1961). "Congress did not intend for RICO to be

used by private plaintiffs to claim treble damages for ordinary violations of criminal and tort laws." *In re Action Industries Tender Offer*, 572 F. Supp. 846, 850 (E.D. Va. 1983).

In this case, Hoai has alleged three such types of racketeering involving Soland: mail fraud; wire fraud; and obstruction of justice. For mail fraud, it is alleged that Soland mailed a total of six letters to Hoai, Suntech, McLean Bank, and Vo. While the dates of these letters are set forth in the Amended Complaint, no other information regarding them is furnished. (See Appendix III, Part G, paragraphs 97 and 102, pages 439 and 441-42).

Serig v. South Cook County Service Corp., 581 F. Supp. 575 (N.D. Ill. 1984), involved a RICO claim based upon mail fraud. In *Serig*, the plaintiff had not disclosed the contents of the letters at issue in the complaint. The court held that to maintain the cause of action it was necessary for plaintiff to set out the contents of the letters, specify in what respect each of the statements were false and misleading, and the factual bases for believing that the defendants acted with an intent to defraud. *Id.* at 580. That required information is absent from Hoai's Amended Complaint.

Clearly, the mail fraud statute prohibits acts made criminal by state or federal law and "any plan, consummated by the use of the mails, in which artifice or deceit is employed to obtain something of value with the intention of depriving the owner of the property." *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980). However, "the mail fraud statute does not taint every breach of business contract . . . but only condemns acts that are

planned or calculated to deceive." *Id.; see also Serig*, 581 F. Supp. at 579. Here Hoai's allegation is simply that two business deals did not evolve as expected. His attempt to convert this breach of contract action into a RICO violation is disingenuous.

Moreover, letters written and mailed by a lawyer in the course of representing a client cannot form the basis for a mail fraud action. *McMurtry v. Brasfield*, 654 F. Supp. 1222, 1226 (E.D. Va. 1987). In *McMurtry*, the plaintiff charged his wife's divorce attorney with a RICO violation based upon mail fraud. Judge Cacheris of the Eastern District of Virginia cited with approval language from the U.S. District Court of Delaware in *Paul S. Mullin & Associates, Inc. v. Bassett*, 632 F. Supp. 532, 540 (D. Del. 1986).

> The Court finds absurd plaintiff's apparent suggestion that a lawyer's act in posting a letter which states a client's legal position in a dispute can constitute mail fraud. If such were the situation, every dispute in which the parties' counsel exchanged letters could give rise to RICO litigation. Such activity simply is not fraudulent.

McMurtry, 654 F. Supp. at 1226. In dismissing the RICO count, Judge Cacheris noted:

> To allow lawyer communication in pending litigation to constitute mail fraud would chill effective representation and would give rise to a number of collateral suits. Congress did not intend that mail fraud statute to sweep so broadly with such detrimental effects on attorney representation and the orderly administration of justice.

Id.

While the allegations in this case do not involve letters written during actual litigation, the letters apparently were written on behalf of Hoai in the course of Soland's representation. The analysis and rule articulated in *McMurtry* should be equally applicable to the case at bar. The letters referenced in Hoai's Amended Complaint are not fraudulent. Rather, they were written in the course of representation of Hoai by Soland and cannot serve as "predicate acts" supporting a "pattern" of activity violative of the RICO Act.

Similarly, the only allegation of wire fraud against Soland in the Amended Complaint is at paragraph 92 which alleges in part: "She participated in interstate telephone calls to further the frauds involved with each of the businesses." (See Appendix III, Part G, pages 436-37). There are no allegations as to the substance of these telephone calls or how they were fraudulent. As with the allegations of mail fraud, this conclusory sentence falls far short of the particularity required to state a cause of action for fraud. Accordingly, as pleaded, wire fraud cannot serve as a type of racketeering activity which would be a basis for a RICO complaint against Soland.

The third type of racketeering activity alleged against Soland in the Amended Complaint is obstruction of justice. (Paragraph 111, See Appendix III, Part G, page 446). In particular this relates to the allegations in paragraphs 92, 93, and 97 of the Amended Complaint which involve Soland. These paragraphs, however, only allege that Soland wrote some letters during the time between May 28, and late August, 1986. There are no allegations as to the contents of these letters nor how they would constitute conduct which would subject Soland to a criminal

charge of obstruction of justice. As with mail and wire fraud, the Amended Complaint is plainly deficient as to this allegation.

In sum, then, there are no predicate acts of racketeering activity properly pleaded against Soland in the Amended Complaint which would support the RICO Count. Accordingly, it was properly dismissed.

D. The Amended Complaint Fails to State a Cause of Action for RICO Violations Against Soland Under any Parts of 18 U.S.C. § 1962.

Lest that not be sufficient, there are other deficiencies in the pleading of the RICO count. As stated, Hoai alleges violations of 18 U.S.C. § 1962 (a), (b), (c), and (d). To violate 18 U.S.C § 1962(a), it is necessary to show that the defendant received and continued to receive income derived from patterns of racketeering activity and used or invested part of such income to acquire an interest in, establish and operate enterprises which affect interstate or foreign commerce. There are no allegations in the Amended Complaint that Soland received any income whatsoever from a pattern of racketeering activity or that any such income was used or invested to acquire an interest in, establish or operate enterprises which affect interstate or foreign commerce.

To violate subparagraph (b) of § 1962, it is necessary to show that the defendant, through a pattern of racketeering activity or through collection of an unlawful debt, acquired or maintained directly or indirectly, an interest in or control of one or more enterprises which are

engaged in or which affect interstate or foreign commerce. As stated, Hoai has not sufficiently identified *any* enterprises involving defendant Soland. Certainly, there are no allegations that Soland has acquired an interest, directly or indirectly, in or control of any enterprise engaged in interstate or foreign commerce.

Nor are there any allegations which support a claim that Soland violated § 1962(c). Subparagraph (c) requires that the defendant be employed by or associated with an enterprise engaged in interstate or foreign commerce and that the individual "conduct or participate" directly or indirectly in the conduct of such enterprises and affairs through a pattern of racketeering activity. The Fourth Circuit in *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) addressed the requirements of the "conduct or participate" language of this subparagraph and held that this required some involvement in the operation or management of a business (enterprise). *Id.* at 1375. The Amended Complaint does not contain any allegations that Soland had any management position or role in any enterprise.

A complaint which merely mimics the wording of the RICO statute without setting forth the facts to support the contentions is subject to dismissal. *Production & Leasing, Ltd. v. Hotel Conquistador, Inc.*, 573 F. Supp. 717 (D. Nev. 1982), *aff'd*, 709 F.2d 21 (9th Cir. 1983); *Adair v. Hurst International Resources Corp.*, 526 F. Supp. 736 (N.D. Ill. 1981). That is precisely what Hoai has done here. For the myriad of reasons set forth, Count I is defective and was properly dismissed.

CONCLUSION

Petitioner has failed to set forth any compelling reasons for this Court to grant certiorari and review the case in full. To the contrary, the initial Complaint in this action violated Rule 8, F.R.C.P., and was properly dismissed.

Similarly, the Amended Complaint fails to state a cause of action for violation of the RICO Act by failing to set forth a "pattern" of activity in support of an "enterprise" which violated the terms of the statute. Accordingly, its dismissal below was proper.

For the reasons expressed herein, respondent Soland respectfully requests that this Court affirm the actions of the district and circuit courts below and deny petitioner's request.

Respectfully submitted,

W. MICHAEL HOLM
Counsel for Respondent
My-Linh D. Soland
HAZEL, THOMAS, FISKE,
BECKHORN & HANES, P.C.
510 King Street
Suite 200
Alexandria, Virginia 22314
(703) 838-5144